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a/s/o Steven Cohen Productions, Ltd.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

STEVEN COHEN PRODUCTIONS, LTD.,
A Nevada Corporation, and ST. PAUL FIRE
& MARINE INSURANCE COMPANY, a
wholly owned subsidiary of The Travelers
Companies, Inc., as subrogee of Steven
Cohen Productions, Ltd.,

Plaintiffs,

vs.

LUCKY STAR, INC., a Tennessee
corporation,

Defendant.

CASE NO.: 2:12-cv-01995-GMN-CWH

**STIPULATION AND ORDER TO
SUBSTITUTE PLAINTIFFS' REPLY IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT FOR AN
AMENDED REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

The parties, by and through their respective counsel, submit the following stipulation:

On September 16, 2015, Plaintiffs filed their Reply in Support of Motion for Summary Judgment [Dkt. No. 101]. Plaintiffs inadvertently filed the incorrect version of their Reply in

Support and request to substitute an Amended Reply in Support in place of the previously-filed Reply in Support. A copy of the Amended Reply is attached hereto as Exhibit A. The filing of the Amended Reply in support is timely, as the deadline for filing the Reply is today, September 18, 2015.

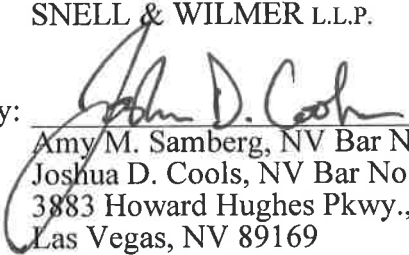
DATED this 18th day of September, 2015.

DATED this 18th day of September, 2015.

SNELL & WILMER L.L.P.

Wood, Smith, Henning & Berman, LLP

By:


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Attorneys for Defendant
LUCKY STAR, INC.

ORDER

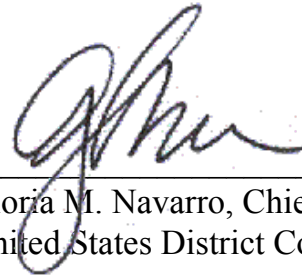
IT IS HEREBY ORDERED that Plaintiffs' previously-filed Reply in Support of Motion for Summary Judgment [Dkt. No. 101] is hereby stricken.

IT IS FURTHER ORDERED that leave to file Plaintiffs' Amended Reply in Support of Motion for Summary Judgment is hereby GRANTED and that the Amended Reply shall be substituted for the previous Reply.

IT IS FURTHER ORDERED that Plaintiffs' Amended Reply in Support of Motion for Summary Judgment is timely as it was filed before the September 18, 2015 deadline.

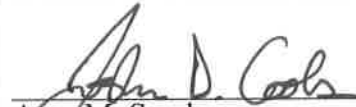
IT IS SO ORDERED.

DATED this 18th day of September, 2015.



Gloria M. Navarro, Chief Judge
United States District Court

Prepared and Submitted by:
SNELL & WILMER L.L.P.



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22569316.1

EXHIBIT A

EXHIBIT A

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STEVEN COHEN PRODUCTIONS, LTD.,
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LUCKY STAR, INC., a Tennessee
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CASE NO.: 2:12-cv-01995-GMN-CWH

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
PURSUANT TO F.R.C.P. 56**

NOW COME the Plaintiffs, STEVEN COHEN PRODUCTIONS, LTD., a Nevada Corporation, and ST. PAUL FIRE & MARINE INSURANCE COMPANY, a wholly owned subsidiary of The Travelers Companies, Inc., as subrogee of Steven Cohen Productions, Ltd., by and through its attorneys Snell & Wilmer L.L.P., and LANGHENRY, GILLEN, LUNDQUIST &

1 JOHNSON, LLC, and for its Reply in Support of their Motion for Summary Judgment pursuant
2 to FRCP 56 does state the following:

3 INTRODUCTION

4 SCP's Motion for Summary Judgment is premised upon two things – the validity of the
5 2011 Agreement for Services, and the fact that the equipment subject to the Agreement for
6 Services was “in use” as defined by Paragraph 12 therein at the time it was damaged. This
7 Motion is not aimed at the adjudication of the damages caused by the Defendant's breach, which
8 Plaintiffs' specifically reserved for a later date. Consequently, Plaintiffs will not address those
9 issues with respect to damages inexplicably addressed by LSI in its Response. (*See*
10 Document 79, Plaintiffs' Motion for Summary Judgment, ¶14)

11 LSI's Response attempts to muddy the waters regarding the validity of the 2011
12 Agreement for Services by arguing that: (1) because the Agreement for Services was unsigned,
13 the Court must look to evidence outside of the four corners of the document when considering its
14 formation and the legal effect thereof – conveniently never using the term “parol evidence”
15 despite spending many pages trying to convince the Court to consider exactly that; (2) SCP failed
16 to support its Motion for Summary Judgment with admissible evidence; (3) SCP failed to prove
17 its damages despite specifically reserving that issue; (4) the terms of the contract, which LSI
18 deems invalid, still act as a bar to SCP's claim; and (5) SCP is not a proper party to this lawsuit.

19 These arguments, some of which LSI has recycled from previous Motions, are without
20 merit. Thus, despite LSI's twenty-seven page attempt to obfuscate the dispositive issues, misstate
21 or ignore facts and applicable law, and repeat arguments this Court has previously found to be
22 without merit, it remains clear that the 2011 Agreement for Services was valid and enforceable
23 between SCP and LSI, and that the subject equipment was damaged while “in use.” Accordingly,
24 the Court should grant the SCP's motion and award judgment as to liability in favor of the
25 Plaintiffs.

26 ///

27 ///

28 ///

1 **I. SCP'S MOTION FOR SUMMARY JUDGMENT IS SUPPORTED BY**
2 **ADMISSIBLE EVIDENCE**

3 **A. The Court should consider the Invoices from SCP and the checks from LSI in**
4 **support of this Motion for Summary Judgment, as both are admissible under**
5 **the Federal Rules of Evidence**

6 LSI would like this Court to follow it down rabbit holes rather than address the irrefutable
7 facts of this case, or explain its own actions following the tragic stage collapse on August 13,
8 2011 that caused extensive damage to equipment owned or supplied by SCP. Indeed, LSI's entire
9 brief is devoted to misrepresentations of fact and law, and can in no way be considered a good
10 faith effort at responding to SCP's Motion for Summary Judgment. Plaintiffs support their
11 Motion for Summary Judgment, in part, with the 2011 Agreement for Services attached as
12 Exhibit B and the invoices from SCP together with copies of LSI checks to SCP which reflect the
13 37 separate, timely payments made by LSI as specifically set forth in Exhibit C – Payment
14 Schedule of the 2011 Agreement for Services. LSI objects saying such evidence is not
15 authenticated, constitutes inadmissible hearsay, and cannot be used in support of this Motion.
16 These claims are demonstrably false because the evidence is both self-authenticating, and though
17 not necessary, the evidence has been authenticated by the testimony of Hellen Rollens, which LSI
18 cites in support of its Response.

19 Contrary to LSI's assertion, there is no requirement that the invoices and checks from LSI
20 be authenticated by affidavit or deposition testimony. Had LSI done even a scintilla of research, it
21 would quickly have found that its argument regarding the admissibility of SCP's Exhibit B to its
22 Motion for Summary Judgment was not well-grounded in either common law or the Federal
23 Rules of Evidence, not to mention that this "evidence" was nevertheless authenticated by the
24 deposition testimony of Hellen Rollens, a portion of which LSI attached in support of its
25 Response.

26 As a prefatory matter, at summary judgment, a party does not necessarily have to produce
27 evidence that would be admissible at trial. At the summary judgment stage, the focus is not on
28 the admissibility of the evidence's form, but on the admissibility of the contents. *Fraser v.*
Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003); *Shepard v. Shinseki*, 2014 U.S. Dist LEXIS

1 20562, *8 (D. Nev. Feb. 19, 2014). The court does not look to whether the evidence is currently
2 presented in an admissible form, but instead whether it *could* be presented in an admissible form
3 at trial. *Fraser*, 342 F.3d at 1037.

4 In *Fraser*, the Court considered whether the contents of a diary could be considered for
5 summary judgment purposes. The Court found that the diary contents were recitations of facts
6 within the plaintiff's knowledge and, depending on the circumstances, could be admitted into
7 evidence in a variety of ways, including testimony as to the relevant portions from her personal
8 knowledge pursuant to Federal Rule of Evidence 603, use of the diary to refresh her recollection
9 under FRE 612, or as a recorded recollection under FRE 803(5). *Fraser*, 342 F.2d at 1037. As
10 such, the Court was required to consider the contents of the diary – whether or not the diary itself
11 was admissible – in the pending motion for summary judgment. *Id.*

12 Similarly, Steven Cohen and Hellen Rollens have been disclosed as potential witnesses in
13 this case. Both can clearly testify about the contents of the invoices from SCP and the payments
14 from LSI; in fact, they already have. (*See* Exhibit F, Deposition of Hellen Rollens, pp. 80-85;
15 Exhibit G, Deposition of Steven Cohen, pp. 59, 63-64, 92). Even if the invoices and checks are
16 not currently in admissible form, the contents of same clearly can be presented in admissible form
17 at trial.

18 Assuming *arguendo* that the documents, themselves, were required to be admissible for
19 this Court to consider them at the summary judgment stage, the invoices and the checks are self-
20 authenticating. LSI's checks do not require extrinsic evidence of authenticity. *United States v.*
21 *Pang*, 362 F.3d 1187, 1191 (9th Cir. 2004). Pursuant to FRE 902(9), as a negotiable instrument, a
22 check is a species of commercial paper, and therefore self-authenticating. *Id.* LSI's checks
23 constitute commercial paper under FRE 902(9) and are therefore self-authenticating.

24 SCP's invoices, while not self-authenticating under the commercial paper exception of
25 FRE 902(9) are nevertheless authenticated under FRE 901(a), which requires "evidence sufficient
26 to support a finding that the matter in question is what its proponent claims." FRE 901(a); *Las*
27 *Vegas Sands v. Nehme*, 632 F.3d 526, 532-33 (9th Cir. 2011). However, the requirement that
28 documents be authenticated through personal knowledge when submitted in a summary judgment

1 motion “is limited to situations where exhibits are introduced by being attached to an affidavit of
2 a person whose personal knowledge is essential to establish the document is what it purports to be
3 – that it is authentic.” *Id.* at 533. Where, as in this case with the invoices from SCP, the
4 documents are submitted to the Court without the need to set forth a basis for personal knowledge
5 to authenticate them, the Court may consider alternative means of authentication under FRE
6 901(b)(4). *Id.*

7 Documents meet the self-authentication requirement where the “appearance, contents,
8 substance, internal patterns, or other distinctive characteristics of the item, taken together with all
9 the circumstances” support a finding that the item is what the proponent claims it is. FRE
10 901(b)(4). Under FRE 901(b)(4), documents can be authenticated by “review of their contents if
11 they appear to be sufficiently genuine.” *Las Vegas Sands*, 632 F.3d at 533. Here, a simple review
12 of the invoices and checks reflect their genuineness. Indeed, LSI does not contest the fact that
13 SCP issued the attached invoices, or that LSI paid them. (*See* Document 94, LSI’s Response in
14 Support of Motion for Summary Judgment, pp. 8-10). The appearance of each invoice is identical
15 in form, notes it was issued with respect to the Sugarland 2011 Incredible Machine Tour, and
16 corresponds to a specific payment period set forth in Exhibit C attached to the Agreement for
17 Services, while each self-authenticating check issued by LSI correlates to a specific invoice from
18 SCP. *See, e.g., United States v. Pang*, 362 F.3d at 1191(holding that the government properly
19 authenticated invoices under FRE 901(b) where it showed the invoices to be identical to other
20 invoices in evidence, the numbers were in sequence with other invoices that were in evidence,
21 and the invoices correlated dollar-for-dollar with the cancelled checks).

22 Plaintiffs need not establish a proper foundation for SCP’s invoices and LSI’s checks
23 through personal knowledge; a proper foundation can rest on any manner permitted by FRE
24 901(a) or 902. *Pang*, 362 F.3d at 1191. Accordingly, Plaintiffs have established proper
25 authentication for SCP’s invoices and LSI’s checks under FRE 901(a) and 902(9).

26 Furthermore, the invoices and checks are admissible under FRE 803(6) as records of a
27 regularly conducted activity. The invoices and checks were made on the dates contained on the
28 records by persons with knowledge at SCP and LSI and were clearly kept in the course of the

1 regularly conducted business of SCP and LSI. Hellen Rollens personally attested to these
2 documents at her deposition; a fact which LSI must be aware of as they attached a portion of Ms.
3 Rollens' deposition and supporting exhibits to its Response, though not surprisingly, LSI
4 neglected to provide that particular section of her deposition. Ms. Rollens testified that she
5 recalled receiving the invoices from SCP; that they were directed to her attention; and that she
6 forwarded them for payment. (See Exhibit F, Deposition of Hellen Rollens, pp. 80, 83-85 and
7 Exhibit 7, attached hereto). Presumably, since LSI relied on Ms. Rollens' testimony in support of
8 its Response, it can have no objection to her as a source of credible and trustworthy information
9 regarding the invoices and checks at issue. See FRE 803(6)(E).

10 Thus, LSI's evidentiary objection to Exhibits B-1 and B-2 are not well-grounded in fact or
11 law. As has been LSI's *modus operandi* since the initial filing of this case three years ago, LSI
12 makes a sweeping technical defense unsupported by the record or applicable law, which requires
13 Plaintiffs to devote time and attention to explaining all of the reasons why LSI is incorrect. In the
14 end, this attempt to divert the Court from addressing the simple truths of this case will fail.
15 Plaintiffs hope this motion will result in a decision on the merits ending LSI's tactic of raising
16 meritless technical defenses that waste the time, money and resources of Plaintiffs and this Court.

17 **II. THE AFFIDAVITS OF NEIL GIBSON, RICK LOCKE AND ROBERT** 18 **MICHAELIS COMPLY WITH THE REQUIREMENTS OF FRCP 56**

19 The affidavits of Neil Gibson, Rick Locke, and Robert Michaelis were attached in support
20 of Plaintiffs' Motion for Summary Judgment and cited to solely for the proposition that the
21 equipment was "in use" – i.e., unloaded from the transport vehicles and on the concert stage when
22 it collapsed.¹ As noted by Plaintiffs in the initial motion, the issues of damages, attorney's fees
23 and costs have been reserved pending the Court's resolution of this Motion which addresses
24 liability only. Nevertheless, LSI has raised objections to portions of all three affidavits, none of
25

26 ¹ Plaintiffs inadvertently omitted Rick Locke's Report from his affidavit, attached to Plaintiffs' Motion for Summary
27 Judgment as Exhibit D. Nevertheless, the Report is part of the record in this case. Rick Locke was deposed on
28 May 21, 2014, at which counsel for LSI was present. The Rick Locke report referenced in his affidavit was made
Exhibit 1 to that deposition, and is attached hereto. See Deposition of Rick Locke, pp. 1-5, 24, and Deposition
Exhibit 1, attached hereto as Exhibit H.

1 which, even if granted by the Court, impair Plaintiffs' assertion that the equipment was "in use"
2 as defined by the Agreement for Services at the time it was damaged.

3 FRCP 56(c)(4) permits the use of affidavits in evaluating a motion for summary judgment.
4 Indeed Rule 56(c)(4) states that "an affidavit...used to support a motion must be made on
5 personal knowledge, set out facts that would be admissible in evidence, and show that the
6 affiant...is competent to testify on the matters stated." As noted above, the affidavits need not be
7 in a form which would be admissible at trial in order for the Court to consider their contents in
8 support of a Motion for Summary Judgment. *Fraser v. Goodale*, 342 F.3d at 1036; *Block v. City*
9 *of Los Angeles*, 253 F.3d 410, 419 (9th Cir. 2001). Thus, "hearsay statements for which there are
10 obvious witnesses who could be called at trial may be properly considered by the Court." *Maddin,*
11 *Inc. v. Allied Ins. Co. of Am.*, 2014 U.S. Dist LEXIS 171653, *2 (D. Nev. Dec. 9, 2014).
12 Consequently, hearsay is not an appropriate objection to the contents of an affidavit. The form of
13 the evidence is irrelevant, the question is whether the substance of the evidence is admissible.
14 *Id.*, *5.

15 It is without question – and LSI does not suggest otherwise – that Neil Gibson, Rick
16 Locke and Robert Michaelis are all competent witnesses who could be called to testify at trial.
17 LSI does not argue that the contents of the affidavits of Neil Gibson, Rick Locke and Robert
18 Michaelis are not the appropriate subject of admissible evidence, or that they could not be
19 testified to at trial. Indeed, even if the physical reports of Rick Locke and Robert Michaelis were
20 found to be inadmissible at trial, both could clearly testify about their investigations from their
21 personal knowledge and use their reports to refresh their recollections. FRE 612; *Fraser*, 342 F.3d
22 at 1037.

23 Neil Gibson is a preeminent expert in his field, as set forth in his affidavit and his
24 deposition (which was relied upon by LSI in its Response) at some length. (*See, e.g.*, Exhibit I,
25 Deposition of Neil Gibson, pp. 30, 32-34 and Exhibit 2, attached hereto). His affidavit offers both
26 fact and opinion evidence. FRE 703 permits Mr. Gibson to base his opinions on facts or data that
27 he has been made aware of or personally observed. Pursuant to FRE 703, "if experts in the
28 particular field would reasonably rely on those kinds of facts or data in forming an opinion on the

1 subject, they need not be admissible for the opinion to be admitted.” Furthermore, under FRE
2 705, “unless the court orders otherwise, an expert may state an opinion – and give the reason for
3 it – without first testifying to the underlying facts or data,” though they may be required to
4 disclose the same on cross-examination.

5 LSI’s objections to the affidavits of Neil Gibson, Rick Locke and Robert Michaelis are
6 meritless. They are particularly off-putting in light of LSI’s decision to attach an affidavit from
7 Mike Vaden. Putting aside, for the moment, that Mr. Vaden was not disclosed in any of LSI’s
8 three FRCP 26 filings as a person likely to have discoverable information, nor offered for his
9 deposition, it begs the question as to what Mr. Vaden’s expertise might be such that it would be
10 appropriate for him to evaluate LSI’s legal obligations under Paragraph 12 of the Agreement for
11 Services². (See LSI’s Exhibit D, ¶7-10, attached in support of its Response to Plaintiffs’ Motion
12 for Summary Judgment). LSI has, once again, sent the Plaintiffs and this Court off on a frivolous
13 tangent which is unsupported by fact or law, and which ultimately has no impact on the issues
14 before this Court.

15 **III. THE 2011 AGREEMENT FOR SERVICES BETWEEN SCP AND LSI IS VALID,**
16 **UNAMBIGUOUS AND SHOULD BE ENFORCED AS WRITTEN**

17 **A. Nevada law does not require either party to sign a written contract for it be**
18 **valid, as they may assent to its terms and conditions by conduct evidencing**
acceptance

19 The 2011 Agreement for Services between SCP and LSI is valid, as evidenced by their
20 performance of its material terms. LSI does not cite a single case that supports its contention that
21 performance by both parties of the material terms of a written contract does not make that
22 agreement valid, even absent the signature of both parties. Similarly, LSI does not cite a single
23 case that stands for the proposition that the signature of one party is necessary to find the
24 existence of a valid contract where both parties performed. Finally, SCP refers this Court to the
25 April 6, 2012 letter from Leon Gladstone to counsel for SCP in the Indiana personal injury
26 lawsuits wherein Mr. Gladstone seeks to tender the defense of claims against LSI to SCP’s

27
28 ² Mr. Vaden’s affidavit sets forth that he is a certified public accountant and business manager, not a lawyer or a judge.

1 insurance carrier pursuant to language in the 2011 Agreement. (See Exhibit L, Gladstone Letter,
2 incorporated by reference). The letter highlights the disingenuous nature of LSI's position in this
3 action that there is no valid contract between SCP and LSI.

4 The one case cited by LSI for the proposition that Nevada law "requires that at least one
5 party to sign a written agreement before its terms can be accepted," *United States Juice Corp. v.*
6 *JMF Group, LLC*, 2006 U.S. Dist LEXIS 49696 (D. Nev. July 18, 2006), says nothing of the
7 kind. In that case, the plaintiff, US Juice, alleges that it had an agreement to sell juice
8 manufactured by the Defendant, ABC. In its Complaint, US Juice alleged that it sent two written
9 agreements to ABC, both of which provided that ABC would indemnify US Juice for problems
10 arising out of ABC's product. After both parties began performing, US Juice received quality
11 complaints regarding the juice provided by ABC, and was forced to take back the faulty product,
12 incurring damages. US Juice sought indemnification from ABC, which ABC refused. US Juice
13 filed suit against ABC, and ABC moved to dismiss the Complaint, arguing that they had never
14 signed any version of an agreement with US Juice.

15 The District Court of Nevada denied the Motion to Dismiss because the court determined
16 U.S. Juice alleged sufficient facts to show that the Agreement is valid under the two prong test
17 requiring acceptance and reliance. *U.S. Juice at* *8-9. "US Juice alleges that on October 10,
18 2002, after receiving the October version of the written Agreement, [ABC] emailed [US Juice]
19 and indicated that the Agreement was satisfactory to ABC." *U.S. Juice* *9. "US Juice has alleged
20 facts which show ABC's reliance, such as their production of the product, distribution of it to US
21 Juice's customers, and acceptance of money in return from US Juice. US Juice's reliance is
22 shown by their ordering the product from ABC and paying for that product." *Id.*

23 What the case does not say is that to be effective, the written agreement had to be signed
24 by *at least* one party. Instead, the court focused on the conduct of the parties finding "that ABC
25 began producing the product and selling it to US Juice indicates that an Agreement was reached
26 and that negotiations were completed." *U.S. Juice at* *9-10. The court is silent about the
27 requirement of a signature. Thus, this case mirrors exactly what SCP did here when it sent the
28 2011 Agreement for Services to LSI and LSI took possession of, and paid for, the equipment. As

1 noted by the District Court of Nevada, the important factors are acceptance and reliance, where
2 acceptance is determined by the conduct of the party, whatever might be that party's actual state
3 of mind.

4 Because it has no other avenue to avoid liability, LSI again attempts to manufacture a
5 phantom requirement that at least one party must sign the agreement, despite the ample evidence
6 demonstrating conduct by both SCP and LSI which establishes demonstrated acceptance and
7 assent to the terms of the 2011 Agreement for Services³. As the District Court of Nevada noted
8 earlier this year, the law in Nevada remains that the "parties 'may adopt a written contract, and
9 thus make it binding as though formally executed by both, without signing.'" *Cass, Inc. v.*
10 *Production Pattern and Foundry Co.*, 2015 U.S. Dist LEXIS 27801, *13 (D. Nev. Mar. 5, 2015)
11 (citing *U.S. Fidelity and Guarantee Co. v. Reno Electrical Works*, 183 P. 386, 387 (Nev. 1919)
12 and *Baran v. Venetian Casino Resort, LLC*, 2008 U.S. Dist LEXIS 74392, *2 (D. Nev.
13 September 26, 2008)). Indeed, "if a person accepts and adopts a written contract, even though it is
14 not signed by him, he is deemed to have assented to its terms and conditions and to be bound by
15 them." *Cass, Inc.*, *13 (citing *Reno Elec. Works*, 183 P. at 387).

16 In the case *sub judice*, LSI assented to the terms and conditions of the 2011 Agreement for
17 Services through its conduct -- seeking insurance for SCP's equipment⁴ and making 37 separate
18 and distinct payments, in varied amounts, as required by the Agreement. Why would Mike
19 Vaden's office have authorized payments totaling more than \$1.8 million be made to SCP if LSI
20 had not agreed to do so pursuant to the Agreement? (*See* Exhibit F, Deposition of Hellen Rollens,
21 pp. 84-85; Document 79-3, Exhibit B-2). Why would Leon Gladstone draft and send the April 6,
22 2012 tender letter if he did not believe there was a valid contract? (*See* Exhibit A, Gladstone

23
24
25 ³ Moreover, the depositions of Ms. Rollens and Ms. Gellman establish that it is common in the entertainment
26 industry for the parties not to sign contracts. (*See* Exhibit F, Deposition of Rollens, pp. 45-46; Exhibit J, Deposition
of Gail Gellman, pp. 72-73, attached hereto).

27 ⁴ The fact that LSI and FFIC ultimately reformed the 2011 policy long after the incident to provide different
28 coverage than was provided in the 2010 policy (so FFIC could argue its policy is excess to the SCP policy) is actually
evidence that LSI and FFIC understood LSI's obligations under the 2011 Agreement for Services immediately
following the incident on August 13, 2011.

1 Letter). LSI's argument defies logic and common sense in an attempt to avoid its clear and
2 unequivocal obligations to SCP under the 2011 Agreement for Services.

3 Finally, Plaintiffs further fail to see how the addition of SCP's signature to the document
4 would have indicated LSI's acceptance of the terms any more than SCP performing all material
5 obligations under the contract and LSI making the 37 separate timely payments called for therein.
6 LSI's attempt to escape responsibility for its contractual obligations also ignores the fact that
7 under neither scenario was LSI required to sign the Agreement for Services in order for it to be
8 effective. Mike Vaden admits he read the agreement and initiated the process to obtain the
9 necessary insurance which Frost Specialty ultimately failed to obtain prior to the August 13, 2011
10 incident. For this Court to rule that no valid contract existed under these facts would not only be
11 a travesty of justice for these Plaintiffs, it would serve as encouragement for others to look for
12 and assert hyper-technical defenses in an attempt to avoid clear contractual liability. The tactics
13 of delay and assertion of meritless arguments utilized by LSI throughout this process should not
14 be allowed to continue and this Court should make clear to future litigants that such strategies
15 will be soundly rejected.

16 **B. The terms of the 2011 Agreement for Services are unambiguous and it is not**
17 **appropriate for the Court to consider parol evidence in construing the fully**
integrated written contract validated by the performance of SCP and LSI

18 Because the 2011 Agreement for Services is a valid and enforceable contract, the Court
19 need not look outside of the four corners of the Agreement to determine the applicable terms. LSI
20 spends many pages asking the Court to consider evidence outside of the 2011 Agreement to
21 determine the intent of the parties and their obligations – i.e., parol evidence, a term that LSI
22 tellingly does not use in the entirety of its twenty-seven page brief, despite arguing there are
23 questions of fact regarding what the parties “intended” by the terms of the Agreement. The reason
24 why LSI never uses the term “parol evidence” is easily discernable – because “extrinsic or parol
25 evidence is not admissible to contradict or vary the terms of an unambiguous written instrument
26 ‘since all prior negotiations and agreements are deemed to have been merged therein.’” *Frei v.*
27 *Goodsell*, 305 P.3d 70, 73 (Nev. 2013) (citing *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281
28 (2001)).

1 LSI would like the Court to consider extrinsic evidence regarding the intent of the parties
2 prior to the validation of the 2011 Agreement on February 25, 2011, as evidenced by LSI's first
3 payment to SCP as required by the express terms of the Agreement. However, the parol evidence
4 rules forbids the Court from receiving evidence which would contradict the written contract.
5 *Galardi v. Naples Polaris, LLC*, 301 P.3d 364, 368 (Nev. 2013).

6 As Plaintiffs set forth in their Motion for Summary Judgment, the terms of the 2011
7 Agreement for Service are clear and unambiguous. LSI, tellingly, does not seriously argue that
8 the terms are ambiguous and capable of multiple interpretations, but instead suggests that the
9 intent of the parties in arriving at the Agreement creates a question of fact for which extrinsic
10 evidence is necessary. Such a position is flat-out wrong, and unsupported by Nevada law.

11 Parties to a written contract are bound by its conditions "regardless of their subjective
12 beliefs at the time the agreement was executed." *Campanelli v. Conservas Altamira, S.A.*, 477
13 P.2d 870, 872 (Nev. 1970). Indeed, when a party to a written contract accepts a contract, he is
14 bound by the stipulations and conditions expressed in it whether he reads them or not. *Id.*
15 "Ignorance through negligence or inexcusable trustfulness will not relieve a party from contract
16 obligations. He who...accepts a written contract, in the absence of fraud or other wrongful act on
17 the part of another contracting party, is conclusively presumed to know its contents and to assent
18 to them, and there can be no evidence for the jury as to his understanding of its terms." *Id.*

19 Thus, LSI's argument that there was no "meeting of the minds" as to the specific terms of
20 the agreement between SCP and LSI in 2011 and therefore, no contractual agreement because a
21 question of fact exists concerning its terms, is crushed under the weight of the evidence that LSI
22 performed under the terms of the 2011 Agreement by its acceptance of the equipment provided by
23 SCP at every single tour stop, through payment of SCP's invoices, and (attempted) procurement
24 of insurance. SCP relied on that performance (ultimately to its detriment) by providing LSI with
25 \$3.5 million worth of equipment. The alleged understanding of the parties prior to the execution
26 of the 2011 Agreement is irrelevant because all prior negotiations were merged into and
27 memorialized by the written 2011 Agreement. LSI has failed to set forth any legal reason that
28 would allow this Court to consider parol evidence regarding the parties' understanding of the

1 Agreement and their intent regarding it. The only reason LSI raises this argument is that it does
2 not like the result mandated by the enforcement of the plain language in Paragraph 12 of the 2011
3 Agreement for Services.

4 **C. LSI's claims of fraudulent inducement are frivolous, unsupported by any**
5 **evidence, barred by applicable law, and contradicted by LSI's actions**

6 If the 2011 Agreement for Services is not valid and enforceable, LSI's actions are curious
7 and without logical explanation. LSI argues that it was tricked into the 2011 Agreement by fraud
8 or misrepresentation, and that parol evidence creates a question of fact sufficient to avoid
9 summary judgment. But, the affidavit of Mike Vaden attached in support of LSI's Response to
10 this Motion for Summary Judgment, states, under oath, that he was the business manager for LSI
11 during 2010 and 2011. In Paragraph 4 he states that he reviewed the 2011 Agreement on behalf of
12 LSI as its business manager. (*See* Document 79-4, Affidavit of Mike Vaden). In Paragraph 5, he
13 states "after reviewing the contract to determine the agreement's insurance obligations, I
14 contacted Lucky Star, Inc.'s insurance broker, Frost Specialty, and requested that the company
15 obtained the insurance needed to cover the equipment that SCP provided to Lucky Star." (*See*
16 Document 79-4, Affidavit of Mike Vaden).

17 It is beyond dispute that LSI actually failed to procure the insurance specified by the 2011
18 Agreement prior to the August 13, 2011 incident. (*See* Exhibit K, Deposition of George Robert
19 Frost, p. 60). It was only after the stage collapse, when SCP put LSI on notice that it was making
20 a claim against LSI under Paragraph 12 of the Agreement, that LSI became aware that it had, in
21 fact, breached its obligation to procure the insurance for SCP's equipment as required by the 2011
22 Agreement for Services. (*See* Exhibit K, Deposition of Frost, pp. 64-70). LSI, through its
23 insurance broker (Frost Specialty), then went to a significant amount of trouble, essentially
24 begging FFIC to issue a policy after the fact that would provide LSI with insurance coverage for
25 the August 13, 2011 incident. (*See* Exhibit K, Deposition of George Robert Frost, pp. 64-70). If
26 the 2011 Agreement for Services was not effective at the time of the stage collapse for whatever
27 reason, why would LSI have needed to insure SCP's equipment? More importantly, after the
28 stage collapsed, both LSI and FFIC's attorney Leon Gladstone knew the 2011 Agreement for

Services was not signed by either party, but FFIC still agreed to reform LSI's policy, *in 2012*, after LSI's insurance broker, Robert Frost, flew from Nashville to San Francisco to beg FFIC to issue retroactive coverage for SCP's equipment. The only plausible explanation for the extraordinary efforts of Mr. Frost on behalf of LSI is that he knew, and LSI knew, LSI was obligated to obtain insurance under the 2011 Agreement just like Frost Specialty had done for LSI under the 2010 Agreement. Indeed, the actions of LSI, FFIC and their attorney, Leon Gladstone, once it was learned that the insurance required by the 2011 Agreement had not, in fact, been purchased, flies directly in the face of LSI's argument in this case (and FFIC's argument in Tennessee) that SCP misrepresented the contents of the 2011 Agreement for Services to LSI and fraudulently induced them to act in some manner.

It is difficult to understand how LSI and its counsel can, in good faith, argue that some alleged misrepresentation by SCP creates a question of fact sufficient to defeat summary judgment, particularly when LSI, through its new counsel, submitted the affidavit of Mike Vaden, which sets forth he was the business manager for LSI in 2010 and 2011, and that he reviewed the 2011 Agreement in "early 2011." (*See* Document 79-4, Affidavit of Mike Vaden, ¶4-5). LSI relies on the sworn declaration of Mike Vaden which establishes that he actually reviewed the insurance requirements of 2011 Agreement – not the alleged misrepresentation by Steve Cohen that the 2010 and 2011 Agreement were the same – and yet LSI has the temerity to assert that it should not be held to account for its obligations to SCP under the 2011 Agreement.

LSI's "claim" that it was fraudulently induced to act by SCP's apparently nefarious Mr. Cohen is irrelevant because Nevada law "precludes assertions of fraud when the alleged misrepresentation is contradicted by the parties' bargained-for terms." *Road & Highway Builders, LLC v. Northern Nev. Rebar, Inc.*, 284 P.3d 377, 380 (Nev. 2012). LSI argues that parol evidence of Cohen's alleged representation that the 2011 Agreement was the same as the 2010 Agreement should be considered by this Court. However, the reported "inducement" by Cohen cannot be something that conflicts with the 2011 Agreement's express terms, "as the terms of the contract are the embodiment of all oral negotiations and stipulations." *Id.* LSI's affirmative defense alleging fraud and misrepresentation does not express the intentions of the parties as set forth in

1 the 2011 Agreement. Accordingly, LSI has pled something which the law will not permit it to
2 prove. *Id.*

3 Here, the alleged fraud is directly related to the subject of the 2011 Agreement for
4 Services – that it was identical to the 2010 Agreement, creating identical obligations – and
5 “where an alleged oral promise directly contradicts the terms of an express written contract, the
6 parol evidence rule applies.” *Id.* (citing *Sherrodd, Inc. v. Morrison-Knudsen Co.*, 815 P.2d 1135,
7 1137 (Mont. 1991)). LSI’s contention that it is “entitled to a trial on its affirmative defenses” is
8 simply wrong as a matter of law, and fails to create a question of material fact sufficient to defeat
9 summary judgment in Plaintiffs’ favor.

10 **IV. THE 2011 AGREEMENT FOR SERVICES NEEDS TO BE CONSTRUED AS A**
11 **WHOLE AND NOT IN PIECEMEAL FASHION**

12 LSI continues to protest, much like Ophelia, that once St. Paul was added to the caption,
13 the relief available to Plaintiffs under the unambiguous terms of the 2011 Agreement was
14 somehow altered by Paragraph 11 of the Agreement for Services. As Plaintiffs set forth at some
15 length when LSI made this exact same argument in its first Motion to Dismiss, LSI’s
16 mischaracterization of Paragraph 11 improperly ignores Paragraph 12 as mere surplusage. (*See*
17 Document 19, LSI’s Motion to Dismiss; and Document 25, Plaintiffs’ Response, incorporated by
18 reference herein).

19 The 2011 Agreement for Services sought to logically allocate the various types of risk
20 which might arise during Sugarland’s 2011 concert tour between the parties, depending on the
21 nature of the risk involved and where or when the incident occurred. Paragraph 12 is specifically
22 directed at property damage to SCP’s equipment while “in use” by LSI. Conversely, Paragraph 11
23 expressly relates to the general liability insurance policies that each of the parties agreed to
24 purchase to protect against claims by third-parties (like the personal injury claims in Indiana that
25 were settled in December of 2014) and not claims for property damage to the Equipment
26 specifically referenced in Paragraph 12. As LSI failed to do in its prior motion with this Court, it
27 again neglects to include in this Response the entirety of Paragraph 11, which reads as follows:

28 ///

1 **11. Liability Insurance.** (a) SCP agrees that at its sole expense, it will procure and will
2 maintain in full force and effect so long as this Agreement shall remain effective, a
3 Commercial General Liability Insurance policy with minimum limits for bodily injury and
4 property damage of \$1,000,000 each occurrence and \$2,000,000 in the aggregate. Upon
5 request, SCP shall provide Producer a Certificate of Insurance evidencing the same.

6 (b) Producer agrees that at its sole expense, it will procure and will maintain in full force
7 so long as this Agreement shall remain effective, a Commercial General Liability
8 Insurance Policy with minimum limits for bodily injury and property damage of
9 \$1,000,000 each occurrence and \$2,000,000 in the aggregate. **Producer shall provide**
10 **SCP a Certificate of Insurance naming Steven Cohen Productions, LTD as**
11 **Additional Insured.** (Emphasis added).

12 Any certificate provided hereunder shall also provide that such insurance will not be
13 cancelled without first giving, as applicable, SCP or Producer thirty (30) days prior
14 written notice. Neither SCP nor Producer shall be liable to the other or to any insurance
15 company (by way or subrogation or otherwise) insuring such party for the death of or
16 injury to any person or for any loss or damage to any tangible property, or any resulting
17 loss of income, or losses under worker's compensation laws and benefits, even though
18 such loss or damage might have been occasioned by the negligence of such party, its
19 agents or employees, if and to the extent that any such loss or damage is covered by
20 insurance benefitting such party or was required to be covered by insurance benefitting
21 such party pursuant to this Paragraph 11.

22 (See Doc. 78-1; 2011 Agreement for Services.)

23 Like any contract, it is important for this Court to interpret the *entire* Agreement for
24 Services in order to effectuate the principle or main purpose of the parties. 11 Richard A. Lord,
25 *Williston on Contracts* § 32.9 (4th ed. 2012). LSI posits that Paragraph 11, which is specifically
26 limited on its face to those losses covered by the liability insurance policies to be purchased by
27 LSI and SCP, somehow acts to defeat the Plaintiffs' claim. However, if LSI really believed that
28 Paragraph 11 defeated Plaintiffs' claim, it would have filed a counter-Motion for Summary
Judgment, arguing the same, as under Nevada law, the interpretation of an integrated written
contract presents a question of law. *May v. Anderson*, 119 P.3d 1254, 1257 (Nev. 2005). LSI's
failure to do so is telling and belies its arguments in the Response. Contract interpretation should
be reasonable and not unduly harsh. *Id.* (citing *Williston on Contracts* §32.11). Although an
individual clause may be read alone to have no ambiguity, the contract must be read as a whole in
order to give a reasonable and harmonious meaning and effect to all its provisions. *National*

1 *Union Fire Insurance Company of the State of Pennsylvania, Inc. v. Reno's Executive Air, Inc.*,
2 682 P.2d 1380, 1383 (Nev. 1984).

3 In this case, LSI blatantly ignores the plain language in Paragraph 12 of the 2011
4 Agreement in a specious attempt to escape its obligations under the Agreement. When construing
5 the 2011 Agreement between SCP and LSI, the Court must avoid negating any contract provision
6 and read the contract as a whole. *Road and Highway Builders*, 284 P. 3d at 380. LSI would have
7 this Court ignore the very logical and common sense agreement to allocate the risk of damage to
8 the equipment provided by SCP to LSI for use during the 2011 concert tour. It is beyond question
9 that the loss before this Court occurred to the specified equipment while it was "in use" as that
10 term is defined in the 2011 Agreement. Accordingly, when the Court construes the contract as a
11 whole, it follows logically that LSI agreed to be responsible for the damage caused to the
12 equipment at issue.

13 LSI's self-serving construction of the 2011 Agreement exempts LSI from liability to SCP
14 for any claimed loss or damage to any tangible property that was covered by "insurance"
15 generally or that was supposed to have been covered by any insurance purchased by SCP,
16 negating Paragraph 12 in its entirety. Simply stated, LSI's assertion does not comport with the
17 requirements of Nevada law, as such an interpretation requires the Court to ignore the common
18 sense allocation of risk agreed to by the parties in Paragraph 12, and also to negate the specific
19 provision in Paragraph 12 requiring LSI to maintain property insurance in the specific amount of
20 \$3,258,000 on SCP's Equipment while it is "in use" by LSI. In other words, to accept LSI's
21 argument requires this Court to ignore the plain language of the Agreement.

22 LSI strategically asserts that it purchased insurance to protect the equipment as required in
23 Paragraph 12 long after the incident at issue. LSI believes the post-accident purchase of insurance
24 somehow magically fulfils its contractual obligations to SCP despite the fact that its insurer
25 (FFIC) is simultaneously arguing in Tennessee that the policy does not cover the equipment or, in
26 the alternative, it provides excess only coverage. If LSI's coverage is illusory, how could they be
27 deemed to have met their contractual obligations? No reasonable interpretation of the 2011
28 Agreement would find that it was the intent of SCP to require LSI to be responsible for the

1 equipment while “in use” on the one hand, while on the other hand, allowing LSI off the hook
2 because LSI chose to purchase an insurance policy that does not provide coverage for the risk LSI
3 accepted in the first sentence of Paragraph 12. Instead, the only logical conclusion for this Court
4 is that LSI must be held directly responsible for the damaged equipment as stated in
5 Paragraph 12, whether or not it purchased insurance that covered the subject equipment.

6 Furthermore, this Court should take specific note that the plain language of the 2011
7 Agreement requires the parties to purchase different amounts of insurance coverage in
8 Paragraph 11 and Paragraph 12. To paraphrase Occam’s razor, the simplest of competing theories
9 is preferred to the more complex, and thus the only reasonable explanation for this difference is
10 that the parties understood the different types of risks involved in the 2011 concert tour and their
11 agreement addressed each type of risk with different and specific requirements for insurance to be
12 purchased by each of the parties to the agreement.

13 Paragraph 11, both by its heading and its plain language, is specifically directed only to
14 the liability insurance policies to be purchased by LSI and SCP during the 2011 concert tour.
15 “Specific words will limit general words if it appears from the whole agreement that the parties’
16 purpose was directed solely toward the matter to which the specific words or clause relate.”
17 *Williston on Contracts*, §32.10. Thus, this Court must conclude that the general waiver language
18 in Paragraph 11 is limited to those circumstances where the Commercial General Liability policy,
19 that each party was required to maintain, is implicated. Construing the contract in the manner
20 suggested by LSI would eliminate and give no effect to other provisions of the contract,
21 specifically but not exclusively Paragraph 12, that were clearly contemplated by the parties at the
22 time that the 2011 Agreement was executed. It is well-settled that a contract must be read and
23 interpreted as a whole, giving effect to all of its provisions and treating none of them as mere
24 surplusage. *Road and Highway Builders*, 284 P.3d at 380. Quite simply, Plaintiffs’ position
25 before this Court does exactly that, while LSI’s construction can only succeed if all of
26 Paragraph 12, and most of Paragraph 11, are disregarded and given no legal effect.

27 ///

28 ///

1 **V. THE COURT RETAINS PENDENT JURISDICTION OVER SCP'S CLAIMS**

2 Plaintiffs are further surprised that LSI continues to assert this Court has no jurisdiction
3 over SCP's claims. As noted by LSI, this Court recently granted LSI's Motion to Dismiss
4 pursuant to FRCP 12(h)(3), finding that SCP's claim fails to satisfy the amount in controversy
5 requirement of 28 U.S.C. §1332, but that the addition of St. Paul, the subrogee and an additional
6 real party in interest pursuant to FRCP 17, cured that deficiency. Consequently, this Court retains
7 supplemental jurisdiction over SCP's pendant claim pursuant to 28 U.S.C. §1367, as noted by
8 Plaintiffs in their recent Brief in Opposition to Transfer to Tennessee. LSI fails to address the
9 existence of 28 U.S.C. §1367, or explain why this Court does not retain pendent jurisdiction over
10 SCP's claim.

11 LSI's response also fails to evidence any understanding of the Court's Order with respect
12 to the addition of St. Paul as a party Plaintiff. The Court's Order of June 5, 2015 did not substitute
13 St. Paul for SCP, but simply added St. Paul. (*See* Document 77, June 5, 2015 Order, pp. 7-8). In
14 addition, LSI's Motion to Dismiss SCP was granted without prejudice, and SCP was specifically
15 granted leave to file a second amended complaint adding St. Paul to cure the jurisdictional defect.
16 (*See* Document 77, June 5, 2015 Order, pp.7-8). There is absolutely no basis whatsoever in the
17 Court's June 5, 2015 Order, or in the applicable federal law, why this Court does not continue to
18 retain pendent jurisdiction over SCP's claim, or why LSI would be entitled to summary judgment
19 for it. The Court's June 5, 2015 Order is very clear and LSI's arguments arising from its
20 misunderstanding of its contents should be swiftly rejected.

21 **CONCLUSION**

22 There are no genuine disputed issues of material fact in this case that would prevent this
23 Court from entering summary judgment on liability in favor of Plaintiffs, SCP and St. Paul. An
24 enforceable contract existed between LSI and SCP and the terms of the contract between LSI and
25 SCP are clear and unambiguous. It is further undisputed that the Equipment at issue was damaged
26 or destroyed while it was "in use" by LSI at the time of the occurrence on August 13, 2011, and
27 that the contract makes LSI responsible for any such damage to the Equipment.

28 ///

1 SCP authorized St. Paul to file suit against LSI in the name of SCP to recover all monies
2 paid by St. Paul to or on behalf of SCP for damages arising from the August 13, 2011 stage
3 collapse claim, and St. Paul stands in the shoes of its insured SCP for purposes of this action
4 against LSI. As St. Paul has, pursuant to its policy of insurance with SCP, paid all sums due and
5 owing to or on behalf of SCP under the policy issued to it, St. Paul has the legal and equitable
6 right to seek recovery of any and all monies paid to or on behalf of SCP, from LSI pursuant to
7 LSI's obligations under the 2011 Agreement for Services. SCP, in turn, has a right to recover
8 from LSI the amount of money it did not recover from its insurer pursuant to its insurance
9 deductible.

10 Accordingly, SCP and St. Paul are entitled to summary judgment on liability against LSI
11 as a matter of law.

12 WHEREFORE, for all the reasons set forth herein, the Plaintiffs, STEVEN COHEN
13 PRODUCTIONS, LTD., a Nevada Corporation, and ST. PAUL FIRE & MARINE INSURANCE
14 COMPANY, a wholly owned subsidiary of The Travelers Companies, Inc., as subrogee of Steven
15 Cohen Productions, Ltd., respectfully request this Honorable Court enter an Order in favor of
16 Plaintiffs and against Defendant, LUCKY STAR, INC., granting this Motion For Summary
17 Judgment on liability only and further request this Court set this matter for prove-up with regard
18 to the damages, costs and expenses, including reasonable attorney's fees, on a date and at a time
19 to be determined by this Court.

20 DATED this 18th day of September, 2015.

21 SNELL & WILMER L.L.P.

22 By: 

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT PURSUANT TO F.R.C.P. 56** by the method indicated below:


<u>XXXXX</u>	Electronic Service (CM/ECF)	_____	Federal Express
_____	U.S. Mail	_____	U.S. Certified Mail
_____	Facsimile Transmission	_____	Hand Delivery
_____	Email Transmission	_____	Overnight Mail

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DATED this 18th day of September, 2015.


An Employee of Snell & Wilmer L.L.P.